

Memorandum

To: Honorable Jerome E. Horton, Chairman
Honorable Michelle Steel, Vice Chair
Honorable Betty T. Yee, First District
Senator George Runner, Second District
Honorable John Chiang, State Controller

Date: March 7, 2012

From: Randy Ferris 
Acting Chief Counsel

Subject: **Board Meeting, March 20-21, 2012**
Chief Counsel Matters – Item J – Rulemaking
Petition for Amendment of Property Tax Rule 462.040, *Change in Ownership – Joint Tenancies*

On February 22, 2012, the Board Proceedings Division received a petition (copy attached) from the California Assessors' Association (CAA) to amend Property Tax Rule¹ 462.040, *Change in Ownership – Joint Tenancies*. This matter is scheduled for the Board's consideration at the March 20-21, 2012 meeting² on the Chief Counsel Matters Agenda. At the meeting, the Board may: (1) deny the petition; (2) grant the petition in part or in whole and commence the official rulemaking process by ordering publication of the notice pursuant to Government Code section 11346.5; (3) direct staff to commence an interested parties process to consider the requested amendments in part or in whole; or (4) take any other action the Board deems appropriate. As explained below, staff recommends that an interested parties process be commenced to consider the requested amendments.

I. Procedural History

The CAA previously filed a petition to amend Rule 462.040 in August 2006. Department staff prepared an issue paper regarding the petition and submitted it to the Board for consideration at the October 11, 2006, Property Tax Committee meeting.³ During that meeting, the Board granted the petition and directed staff to schedule a public hearing regarding the proposed amendments in accordance with Government Code section 11340.7. The notice of action for the proposed amendments was published in the California Notice Register on October 27, 2006 (a copy of the October 27, 2006, Notice Register is available at <http://www.oal.ca.gov/res/docs/pdf/notice/43z-2006.pdf>).

The Board conducted a public hearing regarding the proposed amendments on December 12, 2006, at which time the Board referred the amendments back to the interested parties process. The CAA submitted an additional letter on February 8, 2007, reiterating that it was still

¹ All "Property Tax Rule" or "Rule" references are to title 18 of the California Code of Regulations.

² Under Government Code section 11340.7, the Board has 30 days from receipt to take action on the petition.

³ The amendments requested in the August 2006 petition were narrowed to one issue. That single issue was discussed in the issue paper.

interested in amending Rule 462.040, and that it was advocating five specific changes. Staff issued a February 23, 2007, letter to interested parties informing them about the Board's December 12, 2006, decision to refer the amendments to Rule 462.040 back to the interested parties process, advising the interested parties about the CAA's February 8, 2007, letter, and outlining the new interested parties process. On May 8, 2007, the CAA submitted a letter requesting that the Board delay further action on its petition to amend Rule 462.040. Staff then issued a May 21, 2007, letter informing the interested parties about the delay, and the effective period of the notice of action issued for the proposed amendments to Rule 462.040 subsequently ended one year after the notice was published in accordance with Government Code section 11346.4. There has been no further activity related to the August 2006 petition since the May 21, 2007, letter from staff.⁴

II. Discussion of Change in Ownership of Joint Tenancies and Requested Amendments

Article XIII A, section 2 of the California Constitution requires the reassessment of real property upon a "change in ownership." This section has been implemented by statutes enacted by the Legislature and Property Tax Rules promulgated by the Board of Equalization. As relevant here such authorities regarding joint tenancy include Revenue and Taxation Code⁵ sections 60, 62 and 65 and Rule 462.040.

Section 60 defines change in ownership. Sections 62 and 65 detail the change in ownership law as applied to the creation, transfer, or termination of joint tenancy interests. Subdivision (b) of section 65 excludes from change in ownership the creation or transfer of a joint tenancy interest if, after such creation or transfer, the "transferor or transferors . . . are among the joint tenants." After such a creation of a joint tenancy interest, the transferors who are also transferees become "original transferors." (Rev. & Tax. Code, § 65, subd. (b).) As such, a subsequent transfer or termination of a joint tenancy interest does not result in a change in ownership if the interest vests entirely or in part in an original transferor. (Rev. & Tax. Code, § 65, subd. (c).) When the last original transferor's interest terminates, there is a change in ownership of the entire property. (*Ibid.*)

Rule 462.040 interprets the change in ownership statutes as they apply to joint tenancies and explains in more detail transfers of interests that create original transferor status. By way of its February 22, 2012, petition, we understand that the CAA requests that the Board approve amendments to Rule 462.040 to:

1. Prospectively disallow the creation of original transferor status by transferring property to trusts;
2. Add examples to clarify the change in ownership consequence of severances of certain joint tenancies under Rule 462.040(b)(4)(C);
3. Require a third party be added as a joint tenant in order to create original transferor status; and
4. Require a grantor to also be a grantee in order to accord original transferor status to the grantor's spouse.

⁴ The documents described in this procedural history are available at: <http://www.boe.ca.gov/proptaxes/rule462040.htm>.

⁵ All section references are to the California Revenue and Taxation Code unless otherwise specified.

Rule 462.040 was the subject of rulemaking in 1999 and 2003. During rulemaking, taxpayer representatives, assessors, Board staff and other stakeholders participated in an extensive interested parties process that discussed a number of issues including issues raised by the first, third, and fourth requested amendments. Board staff believes that all interested parties should again have the opportunity to participate in any potential amendments to Rule 462.040, especially since assessors and other parties have experienced the actual application of the amendments that were made in 1999 and 2003.


With respect to the second requested amendment, there is currently ongoing litigation in Marin County related to Rule 462.040(b)(4). As such, we recommend that a decision on the petition with respect to this issue be delayed until the outcome of that litigation is known. Finally, we note that there is currently in the Legislature a bill that would provide that a transfer of a cotenancy interest in real property from one cotenant to the other that takes effect upon the death of the transferor cotenant and that occurs on or after January 1, 2013, does not constitute a change of ownership when certain conditions are met. (See Assem. Bill No. 1700 (2011-2012 Reg. Sess.) as introduced Feb. 15, 2012.)

III. Staff's Recommendation

Staff recommends that an interested parties process be commenced to consider the requested amendments. In staff's opinion, the requested amendments should be fully considered and an opportunity be given to interested parties to bring forth any relevant information since the Rule was last amended in 2003.

If you need more information or have any questions, please contact Christine Bisauta, Acting Assistant Chief Counsel, at (916) 323-2549 or Richard Moon, Tax Counsel IV, at (949) 440-3486.

Approved:


Kristine Cazadd
Executive Director

Attachment: February 22, 2012, California Assessors' Association Petition

RF:ek

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cc: Ms. Kristine Cazadd	MIC: 73
Mr. David Gau	MIC: 63
Ms. Christine Bisauta	MIC: 82
Mr. Dean Kinnee	MIC: 64
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CALIFORNIA ASSESSORS' ASSOCIATION

February 22, 2012

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RE: Request for Revision to Property Tax Rule 462.040 – Joint Tenancy

The California Assessor's Association has been approached with a request that we re-submit a request for revisions to the Joint Tenancy Property Tax Rule.

We reviewed the request submitted back in 2007, and we would like to streamline our suggested changes. We request three changes, and additional clarifying examples for one section.

Our requests, in order of priority, are as follows.

1. Our first and most immediate problem/concern is that of trusts in joint tenancies. We understand the intent behind the rule change in 2003 was to allow registered domestic partners to take advantage of the original transferor exclusion, and that it was attempting to broaden the original intent of a 'family' joint tenancy.

Understanding the joint tenancy exclusions was already confusing for most people. Unfortunately, the addition of trusts to joint tenancy has created additional chaos for both property owners and various administrators, including assessors, title companies, and attorneys. We believe that because of the complexities involved, there is also an increase in inconsistent application and understanding of the rule within assessment offices throughout the state. The real and potential problems that can occur when trusts are considered a joint tenant were both unanticipated and unintended by the Board.

We understand that this change, if agreed to, will be prospective only. We do not intend for anyone to be harmed who has relied on the rule as currently written.

2. Clarifying examples need to be added for section (b)(4)(C). There is currently a court case in Marin County, because an attorney and an appeals board and a Superior Court judge did not understand how this section of the rule was meant to be interpreted.

3. Our third concern is the interpretation that allows a change in vesting to create original transferors. Until 2003, a change in vesting only (e.g. A and B as tenants in common to A and B as joint tenants) would not create original transferors. This is consistent with the original Legislative intent. If parents

were on title and added a child or children as joint tenants, or if two individuals were on title and they added the spouse of one of the individuals, then original transferors would be created. However, a deed that only changed the method of holding title was never intended to result in this exclusion.

4. Finally, we would like to reverse a 1999 amendment to the rule. We do not believe this change follows the requirements of the statute under Revenue and Taxation Code section 65(b).

The amendment was stated as follows: "If a spouse of an original transferor acquires an interest in the joint tenancy property either during the period that the original transferor holds an interest *or by means of a transfer from the original transferor*, such spouse shall also be considered to be an original transferor." (Emphasis added.) In addition, Example 7-2 was added to the rule.

Revenue and Taxation Code section 65(b) states:

There shall be no change in ownership upon the creation or transfer of a joint tenancy interest *if the transferor or transferors, after such creation or transfer, are among the joint tenants*. Upon the creation of a joint tenancy interest described in this subdivision, the transferor or transferors shall be the "original transferor or transferors" for purposes of determining the property to be reappraised on subsequent transfers. The spouses or original transferors shall also be considered original transferors within the meaning of this section. (Emphasis added.)

The code requires that the transferor be among the joint tenants "after such creation or transfer." We believe the rule broadens what is allowed by code.

To summarize, we would like four changes/additions, and in the following priority of urgency.

- First, remove any mention of trusts within a joint tenancy, other than between November 13, 2003 and the date of the proposed regulatory change.
- Second, add examples to clarify the intent of (b)(4)(C).
- Third, return the requirement for an additional person to be added before an original transferor can be created.
- Fourth, require a grantor who is an original transferor to remain on title as a grantee in order for a spouse to acquire original transferor status.

Attached is the Property Tax Rule with suggested revisions in the standard underline/strikeout format.

Thank you for your assistance in this endeavor. Should you have any questions, please call me at (805) 781-5636.

Sincerely,



Tom J. Bordonaro, Jr.
California Assessor's Association, President
San Luis Obispo County, Assessor

Attachment

Rule 462.040 CHANGE IN OWNERSHIP – JOINT TENANCIES.

Authority Cited: Section 15606, Government Code.

Reference: Sections 60, 61, 62, 63, 63.1, 65, 65.1, 67, Revenue and Taxation Code; Section 662, Evidence Code.

(a) The creation, transfer, or termination of a joint tenancy interest is a change in ownership of the interest transferred.

Example 1: The purchase of property by A and B, as joint tenants, is a change in ownership of the entire property.

Example 2: The transfer from A and B, as joint tenants, to C and D, as joint tenants, is a change in ownership of the entire property.

Example 3: The subsequent transfer from C and D, as joint tenants, to C, as sole owner, is a change in ownership of 50% of the property.

(b) The following transfers do not constitute a change in ownership:

(1) The transfer creates or transfers any joint tenancy interest, ~~including an interest in a trust,~~ and after such creation or transfer, the transferor(s) is one of the joint tenants. Such a transferor(s) is also a transferee(s) and is, therefore, considered to be an "original transferor(s)" for purposes of determining the property to be reappraised upon subsequent transfers. If a spouse of an original transferor acquires an interest in the joint tenancy property ~~either during the period that the original transferor holds an interest or by means of a transfer from the original transferor,~~ such spouse shall also be considered to be an original transferor. For the transfer of a joint tenancy interest into trust from November 13, 2003 to [the date before the effective date of the proposed regulatory change], Any joint tenant may also become an original transferor by transferring his or her joint tenancy interest to the other joint tenant(s) through his or her trust if the trust instrument names the other joint tenant(s) as the present beneficiary or beneficiaries. All other initial and subsequent joint tenants are considered to be "other than original transferors."

Example 4: A and B own property as tenants in common and transfer the property to A and B as joint tenants. A and B do not become ~~are both~~ "original transferors." For A and B to become "original transferors," the transfer must be to A and B and at least one other person.

Example 4-1: A and B purchase property as joint tenants. ~~Later On December 12, 2004,~~ A and B transfer their property interests to each other as joint tenants through their respective trusts. A and B are transferors who are among the joint tenants and are, therefore, considered to be "original transferors." If A and B had transferred their interests into trust before November 13, 2003 or after [one day before the effective date of the proposed regulatory change], neither A's Trust nor B's Trust would be considered a joint tenant and neither A nor B would be considered an "original transferors" as a result of the transfer into trust.

Example 5: A and B, as joint tenants, transfer to A, B, C, and D as joint tenants. No change in ownership because A and B, the transferors, are included among the transferees and are, therefore, "original transferors." (C and D are "other than original transferors.") Likewise, if A, as the sole owner, had transferred to A, B, C, and D as joint tenants, no change in ownership. A would be an "original transferor" and B, C, and D would be "other than original transferors."

Example 6: A and B, as joint tenants, transfer to A, B, C, D and E as joint tenants. E is B's wife. No change in ownership because A and B, the transferors, are included among the transferees and are, therefore, "original transferors." E is also an "original transferor." (C and D are "other than original transferors.")

Example 7-1: A, B, and C are joint tenants and A is an "original transferor." A dies. B and C transfer to B, C, and D as joint tenants. D is A's husband. D does not become an original transferor because he did not acquire his interest during the period that A held an interest in the joint tenancy.

~~Example 7-2: A and B, as joint tenants, transfer to B and C, as joint tenants, and C is A's spouse. C is an original transferor because he was the spouse of an original transferor and he acquired an interest by means of a transfer from A.~~

Example 7-32: A and B are joint tenants and A is an "original transferor." C is A's spouse. A and B as joint tenants transfer to A, B, and C. C is an original transferor.

Example 8: A and B, as joint tenants, transfer to B, C and D, as joint tenants. 66 2/3% change in ownership of the transferred interests because A is not one of the transferees.

Example 9: A and B purchase property as joint tenants, ~~and transfer their joint tenancy interests to each other through their respective trusts. A and B become "original transferors."~~ On August 13, 2003, A and B sell a 50% interest to C and D, with the deed showing A, B, C and D as joint tenants. A and B become "original transferors." On December 13, 2003, C and D then transfer their joint tenancy interests to each other through their trusts, so that both become "original transferors." On January 13, 2004, A and B then sell their remaining 50% to C and D, and go off title. Under circumstances where application of the step-transaction doctrine to disregard the form of the transaction would be appropriate due to their intent to avoid a change in ownership, ~~A, B, C, and D~~ do not become "original transferors" as the result of their transfers to each other.

(2) The transfer terminates an original transferor's interest in a joint tenancy described in (b)(1) and the interest vests in whole or in part in the remaining original transferor(s); except that, upon the termination of the interest of the last surviving original transferor, there shall be a reappraisal of the property as if it had undergone a 100 percent change in ownership.

Example 10: A and B transfer to A, B, C, and D as joint tenants. A dies or grants his interest to the remaining joint tenants, B, C, and D. No change in ownership because B, an original transferor, remains as a joint tenant.

Example 11: Following the example set forth in Example 10 (above), B dies or grants his interest to C and D. 100 percent change in ownership because both A's and B's interests had previously been excluded from reappraisal and B was the last surviving original transferor.

(3) The transfer terminates a joint tenancy interest held by other than an original transferor in a joint tenancy described in (b)(1) and the interest is transferred either to an original transferor, or to all the remaining joint tenants, provided that one of the remaining joint tenants is an original transferor. The original transferor status of any remaining joint tenants ceases when a joint tenancy is terminated.

Example 12: Following the example set forth in Example 10 (above), C, not an original transferor, grants his interest to B and D as joint tenants. No change in ownership because C grants to the remaining joint tenants, B and D, and B is an original transferor.

Example 13: ~~A owns real property and transfers a 50% interest to B as a tenant in common resulting in a change in ownership of that 50% interest. They subsequently transfer to themselves in joint tenancy and, as a result, become "original transferors."~~ Following the example set forth in Example 12 above, A D dies and AD's joint tenancy interest passes to B by operation of law without a change in ownership because B is an "original transferor." Upon AD's death, the joint tenancy is terminated and B ceases to be an "original transferor."

(4) For other than joint tenancies described in (b)(1), the transfer is between or among co-owners and results in a change in the method of holding title but does not result in a change in the proportional interests of the co-owners, such as:

(A) a transfer terminating the joint tenancy and creating separate ownerships of the property in equal interests.

(B) a transfer terminating the joint tenancy and creating a tenancy in common of equal interests.

(C) a transfer terminating a joint tenancy and creating or transferring to a legal entity when the interests of the transferors and transferees remain the same after the transfer. (Such transferees shall be considered to be the "original co-owners" for purposes of determining whether a change in ownership occurs upon the subsequent transfer(s) of the ownership interests in the property.)

Example 14-1: A and B purchased property as joint tenants, and transfer to X Corporation, each taking back 50% of the stock. No change in ownership.

Example 14-2: A and B own property as joint tenants, and A is an original transferor. A and B transfer to X Corporation, each taking back 50% of the stock. 100% change in ownership, since this was a joint tenancy described in (b)(1) above.

(5) The transfer is one to which the interspousal exclusion applies.

(6) The transfer is of a joint tenancy interest of less than five percent of the value of the total property and has a value of less than \$10,000; provided, however, that transfers of such interests during any one assessment year (the period from

January 1 through December 31) shall be accumulated for the purpose of determining the percentage interest and value transferred. When the accumulated interests transferred during any assessment year equals or exceeds five percent of the value of the total property or \$10,000, exclusive of any interest transferred to a spouse or other exempt transfer, only that percentage of the property represented by the transferred accumulated interests shall be reappraised. For purposes of this subsection, the "accumulated interests transferred" shall not include any transfer of an interest that is otherwise excluded from change in ownership.

(7) The transfer is one to which the parent-child or grandparent-grandchild exclusion applies, and for which a timely claim has been filed as required by law.

(c) For purposes of this section, for joint tenancies created on or before March 1, 1975, it shall be rebuttably presumed that each joint tenant holding an interest in property as of March 1, 1975, shall be an "original transferor." This presumption is not applicable to joint tenancies created after March 1, 1975.

(d) For purposes of this section, the assessor may consider persons holding joint title to property, such as tenants in common, to be joint tenants and "original transferors" if there is "reasonable cause" to believe that the parties intended to create a joint tenancy and each person was a transferor among the persons holding title. "Reasonable cause" means a deed, Affidavit of Death of Joint Tenant, a trust, will, or estate plan indicating that a joint tenant was a transferor among the joint tenants, unless circumstances causing the application of the step transaction exist.

Example 44 15: A and B jointly purchase their primary residence and title is recorded as tenants in common. The sales contract states that A and B intended to take title as joint tenants. ~~Subsequently, A and B each execute revocable living trusts transferring their respective interests in the property to their trusts for the benefit of each other.~~ The assessor may determine that the sales contract and trust instruments establishes that A and B intended to hold title as joint tenants upon purchase, and that each subsequently became an "original transferor."